No. 12,257

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and MARTIN M. MORENO,
Appellants,

vs.

JOSHUA HENDY CORPORATION,
Appellee.

Motion of Pacific Maritime Association for Leave to File a Brief as Amicus Curiae. and Brief of Pacific Maritime Association as Amicus Curiae With Appendices

GREGORY A. HARRISON,
ROBERT E. BURNS,
RICHARD ERNST,
BROBECK, PHLEGER & HARRISON,
111 Sutter Street,
San Francisco 4, Calif.
Attorneys for Pacific Maritime Association.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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To the Honorable, the Judges of the United States Court Of Appeals for the Ninth Circuit:

Now comes Pacific Maritime Association and respectfully moves that the Court grant leave to file the annexed brief *amicus curiae,* and that the Court consider it in support of the constitutionality of Section 16(e) of the Fair Labor Standards Amendments of 1949 (29 U.S.C., 2166).

The decision of this constitutional issue is of major significance. A large number of overtime-on-overtime suits are pending in various courts in the continental United States and in the Territory of Hawaii. Many of these in-

volve the longshore and stevedoring industry and seek recovery against members of this Association, whose membership includes virtually all Pacific Coast employers of longshore and stevedoring labor.

Pending in this court is *Duane Moss, et al. v. Hawaiian Dredging Co., et al.,* and consolidated cases, No. 12,571. In that group of cases the issue of the constitutionality of the Overtime-on-Overtime Act is being presented to the Court under an oral stipulation, arrived at in the hearing before this Court on June 19, 1950, that final judgment may be entered for the defendants if the Overtime-on-Overtime Act is held constitutional. Other cases, including many being defended by private employers as well as those defended by the United States, are pending in the District Courts in California, Washington and Hawaii. In at least one of these, counsel for the plaintiffs have specifically agreed with counsel undersigned that the complaints may be dismissed if the Overtime-on-Overtime Act is held constitutional.

Respectfully submitted,

Gregory A. Harrison,
Robert E. Burns,
Richard Ernst,
Brobeck, Phleger & Harrison,
Attorneys for Pacific Maritime Association.

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Brief of Pacific Maritime Association as Amicus Curiae

PRELIMINARY STATEMENT

The constitutional issue before this Court is the validity of Section 16(e) of Public Law 393, 81st Congress, 29 U.S.C. 216b. This reads:

> "No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such

work was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

This is a reenactment of the provision of Section 2 of Public Law 177, 81st Congress. This provision, plus the substantive changes of Section 7 of the Fair Labor Standards Act of 1938 referred to therein, constitute what has become popularly known as the "Overtime-on-Overtime Act."

In the instant case this Court handed down its opinion on June 28, 1950, giving effect to the Overtime-on-Overtime retroactive provision. The result was to require the employer to pay the full amount of overtime compensation required by law while giving him credit for all overtime compensation previously paid as required by contract. Thus the plaintiffs were awarded full overtime compensation without giving them "overtime on overtime."

ARGUMENT

The Overtime-on-Overtime Act was intended by Congress to provide a workable assimilation of contractual and statutory provisions for the payment of overtime compensation.

To do this, Congress has provided that there shall be no pyramiding of statutory overtime on top of contractual overtime. Overtime premium payable under a labor contract may be excluded from the computation of the regular rate of pay under the Fair Labor Standards Act and may be credited against any overtime premium due under that Act. With this being assured, employers and labor organ-

izations are free to enter into collective bargaining arrangements to give overtime conditions better than the minimum established by law. This is why organized labor, employers, and the government joined in expressing the need for this legislation.[1]

The retroactive provision was added in the Senate after exhaustive hearings on the subject. On the basis of these hearings, the Congress concluded that the overtime-on-overtime claims were of the same nature as, and indistinguishable from, the Portal-to-Portal claims and that the flood of overtime-on-overtime claims was a burden on interstate commerce that, like the earlier flood of Portal-to-Portal claims, threatened the free flow of commerce. Following the example of portal-to-portal, another retroactive modification of the Fair Labor Standards Act was enacted to protect commerce.[2] This, the Overtime-on-Overtime retroactive provision, is accordingly in the mold of retroactive modification of the Fair Labor Standards Act used in Section 2(a) and Section 9 of the Portal-to-Portal Act.[3]

The Overtime-on-Overtime retroactive provision is constitutional for the same reasons that sustain these other retroactive modifications of the Fair Labor Standards Act. *It is a proper exercise of the Congressional power to regulate interstate commerce.* This power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its

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1. See the House Committee's Report accompanying H. R. 858 printed in part as Appendix A, particularly p. 3.

2. See the Senate Committee's Report accompanying H. R. 858 printed in part as Appendix B, particularly pp. 12, 13.

3. The language of each of these is set forth in Appendix C.

utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . The sovereignty of congress, though limited to specified objects, is plenary as to those objects. . . . The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse."[4] In the exercise of this power, Congress may use an unreviewable judgment in fashioning remedies to foster and promote commerce by removing burdens and obstructions to its free and uninterrupted flow, and even to prevent commerce from promoting physical, moral or economic evil. "*This broad commerce clause* does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it *is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts.*"[5]

The constitutionality of retroactive modifications of the Fair Labor Standards Act is fully established. All the constitutional arguments attacking them have been fully disposed of in several opinions.[6] So clear is the case, that the later opinions of the Courts of Appeal, including three op-

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4. *Gibbons v. Ogden,* 9 Wheat 1, 196, 197.

5. (Italics added) *North American Co. v. Securities & Exchange Commission,* 327 U.S. 686, 705, and cases cited at 705 and 706. See also *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, cases cited at pp. 307-311; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.,* 142 Tex. 141, 176 S.W.2d 564, cert. den. 322 U.S. 747.

6. *Rogers Cartage Co. v. Reynolds,* 166 F.2d 317 (6th Circ.); *Seese v. Bethlehem Steel Co.,* 168 F.2d 58 (4th Circ.); *Battaglia v. General Motors Corp.,* 169 F.2d 254 (2d Circ.); cert. den. 335 U.S. 887; *Darr v. Mutual Life Ins. Co.,* 169 F.2d 262 (2nd Circ.) cert. den. 335 U.S. 871; *Fisch v. General Motors Corp.,* 169 F.2d 266 (6th Circ.) cert. den. 335 U.S. 902.

inions of this Court, have upheld the constitutionality of the retroactive modifications without any extended discussion of the arguments.[7]

> "Up to now every decision has upheld the constitutionality of the [Portal-to-Portal retroactive] statute. The unanimity of result represents as accurate an expression of the views of the federal judiciary as it is possible to obtain. In adition to this unanimity among District Courts and Courts of Appeals there is the uniform refusal of certiorari by the Supreme Court. We have been taught that a denial of certiorari does not mean Supreme Court approval of a Court of Appeals position. But in this particular situation where there have been eight denials involving the same constitutional questions, we think that the series of denials is not without an implicit significance with regard to the Supreme Court's attitude upon the question involved."[8]

Turning to the Constitutional arguments considered in the principal opinions, it is clear there is no Constitutional difference between the Portal-to-Portal and the Overtime-on-Overtime retroactive modifications of the Fair Labor Standards Act. Indeed, the District Court, after study of

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7. *Potter v. Kaiser Co.*, 171 F.2d 705 (9th Circ.); *Rose v. J. Neils Lumber Co.*, 171 F.2d 706; *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984 (9th Circ.); *Atallah v. Hubbert & Co.*, 168 F.2d 993 (4th Circ.), cert. den. 335 U.S. 868 *sub nom Cingrigrani v. Hubbert; Lasater v. Hercules Powder Co.*, 171 F.2d 263 (6th Circ.); *Lee v. Hercules Powder Co.*, 171 F.2d 950 (7th Circ.); *McDaniel v. Brown & Root, Inc.*, 172 F.2d 466 (10th Circ.); *Newsome v. E. I. duPont de Nemours & Co.*, 173 F.2d 856 (7th Circ.), cert. den. 338 U.S. 824; *Busch v. Wright Aeronautical Corp.*, 174 F.2d 322 (6th Circ.); *Adkins v. E. I. duPont de Nemours & Co.*, 176 F.2d 661 (10th Circ.); *Manosky v. Bethlehem-Hingham Shipyard*, 177 F.2d 529 (1st Circ.).

8. *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713 (3rd Circ.).

this in the *Moss* case, concluded that "the issue of constitutionality as raised is not substantial."[9]

These provisions are retroactive, but it is well established that *retroactive laws are not prohibited by the Constitution in civil cases.* The courts have no power to declare an Act of Congress void upon that ground alone.[10]

The retroactive provisions admittedly have affected property rights. "What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate comerce."[11] These rights are purely statutory. They are but the incidental product of a regulation of commerce. They are rights of a "private-public character"[12] and so peculiarly subject to modification, control or abolition in the public interest. *Being "purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment."*[13]

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9. Tr. in No. 12571, pp. 54, 55.

10. *Fisch v. General Motors Corp.,* 169 F.2d 266, 271, 272, **upholding Portal-to-Portal,** citing *Blount v. Windley,* 95 U.S. 173, 180; *Watson v. Mercer,* 8 Pet. 88, 110. See also *Calder v. Bull,* 3 Dall. 386, 390; *Stephens v. Cherokee Nation,* 174 U.S. 445, 477, 478; *Johannessen v. United States,* 225 U.S. 227, 242.

11. *Seese v. Bethlehem Steel Co.,* 168 F.2d 58, 64.

12. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 704, 709.

13. *Rogers Cartridge Co. v. Reynolds,* 166 F.2d 317, 321, which was relied upon by this Court in sustaining Section 9 of the Portal-to-Portal Act in *Lassiter v. Guy F. Atkinson,* 176 F.2d 984, 986. See also, **upholding Portal-to-Portal,** *Battaglia v. General Motors Corp.,* 169 F.2d 254, 259; *Fisch v. General Motors Corp.,* 169 F.2d 266, 271: "It is nothing short of a paradox to say that the Congress could not abolish this previously granted right if it concluded that the public interest required a change."

A contention has been made that some statutory overtime pay rights are of a contractual nature. This contention, self-contradictory on its face, is of no consequence even if it were meritorious. Private persons cannot by contract take themselves outside of the power of Congress to regulate commerce.[14] Every contract has read into it the reservation of essential attributes of sovereign power as the postulate of the legal order.[15] Any contractual arrangements that were initially subject to the commerce power as exercised in the Fair Labor Standards Act must, in turn, be subject to that power if its exercise changes that Act. Such *a statutory change may constitutionally render that contract unenforceable or impair its value.*[16] "The power of Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy."[17]

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14. *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 308.

15. *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 435.

16. *Battaglia v. General Motors Corp.,* 169 F.2d 254, **upholding Portal-to-Portal,** quoting *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467, 482, 485, 486 and citing *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 307-309; *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 228, 229; *Scranton v. Wheeler,* 179 U.S. 141, 162, 163.

See also, **upholding Portal-to-Portal,** on this "contractual right" point, *Darr v. Mutual Life Ins. Co.,* 169 F.2d 262, 266; *Fisch v. General Motors Corp.,* 169 F.2d 266, 270, 271; *Thomas v. Carnegie-Illinois Steel Corp.,* 174 F.2d 711, 713.

17. *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 310.

CONCLUSION

The constitutionality of retroactive modifications of the Fair Labor Standards Act, whether Portal-to-Portal or Overtime-on-Overtime, was summed up by the Court of Appeals for the Fourth Circuit in the *Seese* case:[18]

> "The Fair Labor Standards Act did not provide payment for employees engaged in that commerce but means by which wages might be regulated through application of maximum and minimum standards. When it was learned that this instrument of regulation was about to be used in such way as to injure the very commerce that it was designed to help, it is idle to say that Congress was without power to amend it in such way as to avoid the evil that was threatened."

Respectfully submitted,

Gregory A. Harrison,
Robert E. Burns,
Richard Ernst,
Brobeck, Phleger & Harrison,
Attorneys for Pacific Maritime Association.

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18. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 63.

(Appendices follow)

Appendix A

81ST CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 121

CLARIFYING OVERTIME COMPENSATION IN CERTAIN INDUSTRIES UNDER THE FAIR LABOR STANDARDS ACT

FEBRUARY 15, 1949.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. LESINSKI, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Education and Labor, to whom was referred the bill (H. R. 858) to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the stevedoring and building construction industries and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as so amended do pass.

The amendments are as follows:

(a) Page 1, line 7, after the word "employee" and before the dash, insert "employed in the longshore, stevedoring, building and construction industries."

(b) Amend the title so as to read:

A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries.

STATEMENT

Under collective bargaining arrangements antedating the Fair Labor Standards Act of 1938, covering employees in the longshore, stevedoring, building and construction industries, work at straight-time rates has long been limited to specified hours of the day and week which were established in good faith under such agreements as the basic, normal, or regular workday or workweek for such employees. Under these agreements, work outside the basic, normal, or regular workday or workweek has traditionally been considered overtime and has been paid for at an overtime rate providing compensation 50 percent or more in excess of the bona fide rate payable during the basic, normal, or regular workday or workweek. Work performed on Saturdays, Sundays, holidays or on the sixth or seventh day of the workweek was likewise ordinarily made compensable at such contract overtime rates. The same pattern of compensation for employees in these industries was continued in collective bargaining agreements executed since the Fair Labor Standards Act of 1938 became effective.

Under the decisions of the Supreme Court of the United States in *Bay Ridge Operating Co. v. Aaron* and *Huron Stevedoring Corp. v. Blue* (335 U.S. 838), handed down on June 7, 1948, it was settled that the premium payments made to longshoremen for Saturday, Sunday, holiday, and night work under such agreements were not true overtime premiums for purposes of the Fair Labor Standards Act but were, rather, payments for work at undesirable hours. As such, the existing provisions of the Fair Labor Standards Act required that they be included in computing the regular rate of such employees and that they could not be credited toward overtime compensation due under the act.

The committee has heard testimony of representatives of labor, management, and the Department of Labor, all of whom are in agreement that the present law, in circumstances such as those considered by the Supreme Court in the Bay Ridge case, is creating serious difficulties in the maintenance of desirable labor standards arrived at through collective bargaining in the longshore, stevedoring, building and construction industries, and that amendment of the act to correct this situation is urgently necessary in order to prevent labor disputes which would seriously burden and obstruct commerce.

The potential effects of the present overtime requirements of the Fair Labor Standards Act on these types of agreements were demonstrated in the negotiation of a new contract for the east coast longshore industry in the fall of 1948. The inability of the parties to agree on a substitute for their traditional work pattern was an obstacle to settling a crippling strike. The anticipation of prompt legislative action to remedy this situation was one of the factors inducing settlement.

Appendix B

Calendar No. 391

81ST CONGRESS, *1st Session* | SENATE | REPORT No. 402

CLARIFYING OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED

MAY 18 (legislative day, APRIL 11), 1949.—Ordered to be printed

Mr. HILL, from the Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Labor and Public Welfare, to whom was referred the bill (H. R. 858) entitled "A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building, and construction industries," having considered the same, now report the said bill, with amendments, and recommend that said bill, as so amended, do pass.

STATEMENT

This bill is intended as an amendment to section 7 of the Fair Labor Standards Act of 1938 and is designed to correct a situation which has developed in connection with the

so-called "clock overtime" or "overtime on overtime" issue. While this problem has arisen in a number of industries in this country, it has assumed particular importance in the longshore and stevedoring industries. In those industries, it has become particularly acute because of the decision of the Supreme Court in the case of *Bay Ridge Operating Co., Inc. v. Aaron* (334 U.S. 446, 1948) and a series of claims instituted in the courts seeking to recover, under the Fair Labor Standards Act of 1938, extra compensation allegedly due by reason of the failure of these industries to compute overtime compensation in compliance with that act. Estimates of the possible liability of industry generally vary substantially. The minimum figure which has been cited for the longshore and stevedoring industries is $10,000,000, but other estimates for these industries range up to a figure approximating $300,000,000. In other industries, such as electric and gas utilities, where continuous operations are essential, the potential liability is undetermined but of a substantial nature.

Basically, the problem stems from the failure of the Congress to include in the Fair Labor Standards Act any definition of "regular rate" of pay. The applicable provisions of that act read as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The bill, the adoption of which this committee recommends, would have the effect of furnishing a partial defini-

tion of "regular rate" of pay, in that the following extra compensation would not be deemed a part of the regular rate of pay[1] for the purpose of computing statutory overtime and would be creditable toward overtime payments required by the law:

1. Premium rates for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

Two main questions were raised before your committee. As passed by the House, by a vote of 230 to 7, the bill applied only to future claims and was limited to the longshore, stevedoring, building, and construction industries. There was testimony to the effect that the House Committee on Education and Labor was unable to act upon the suggestion that a provision be added giving the bill retroactive effect because, it was claimed, under the rules of the House such a provision would not have been germane since the bill as originally introduced did not cover retroactivity.

In the hearings before your committee, substantial issues were raised as to (1) whether the bill should be made retro-

1. A full definition of "regular rate" of pay is now being considered by your committee in connection with the over-all revision of the Fair Labor Standards Act proposed in S. 653.

active to protect employers against existing claims for so-called "overtime on overtime" and (2) whether the bill should be broadened to include industry generally, instead of being restricted to the industries mentioned above. A subcommittee heard extensive testimony on both of these points from union and industry spokesmen, from counsel for claimants who have filed suit, and from certain of the executive departments and agencies. At the close of the hearings, briefs were requested by the subcommittee.

At the hearings, the proposal for retroactive validation of the provisions in collective bargaining or other employment agreements conforming to the standards generally agreed upon for future application was opposed principally by counsel for claimants who have instituted suits to recover so-called "overtime on overtime." They were joined in opposition by counsel for the CIO. On the other hand, the retroactive feature was not opposed by the A. F. of L. and, while that organization did not affirmatively support the principle of retroactivity, testimony of the International Longshoremen's Association, the A. F. of L. union principally affected, strongly suggested the need for such relief. The executive departments either supported the proposal for retroactive relief or failed to register any opposition thereto. No serious objection was made to the proposal that the bill be broadened to include industry generally.

Upon a careful consideration of the testimony and briefs, the committee has concluded that the bill should be amended so as to validate past overtime practices under collective bargaining or other agreements, thus avoiding the payment of "overtime on overtime" for the past as well as for

the future. We have also concluded that the bill should be made general in its application.

* * * * * * *

RETROACTIVITY

The only question remaining for consideration is whether the provisions of this bill should be made retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which shall have accrued prior to the enactment of this bill.

In considering this question, we have been fully cognizant of the traditional policy against the granting of such relief except under special circumstances. Deviations from this policy, we believe, should not be made lightly, for retroactive relief is an extraordinary remedy.

The issue which the committee has had to resolve was whether the facts establish the special circumstances warranting retroactive relief. We are of the opinion that they do. The considerations prompting this conclusion are as follows:

1. The claims are in the nature of windfalls and in derogation of the collective-bargaining agreements as understood in the past by the contracting parties. The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement. The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims

arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime requirements, were the result of collective bargaining. There is no evidence that the bargaining was other than at arm's length. It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was 8½ times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.

3. The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was—

> intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining (H. Rept. No. 1452, 75th Cong., 1st sess., p. 9; S. Rept. No. 884, 75th Cong., 1st sess., pp. 3-4).

4. Without retroactivity, the effect upon many companies that have an important impact upon commerce may be disastrous. As to the longshore industry, estimates of potential liability range from $10,000,000 to approximately $300,000,000. It is contended that the Government would assume much of the potential liability. This would appear to be the situation, at least in those areas covered by War Shipping Administration contracts, as a result of the cost-plus-fixed-fee arrangement and the 1945 indemnity agree-

ment. It is questionable, however, whether the same result would follow outside this area, as, for example, contracts with the War Department, which did not contain any cost-plus-fixed-fee provision. It is probable, therefore, that the industry, in the event of successful prosecution of these cases, would not be completely insulated. The evidence presented to your committee reveals that the average stevedore has a net worth of between $100,000 and $250,000; that his annual wage bill is between 10 and 15 times his net worth; that collection of claims, adding only 5 percent per annum to his wage bill for only 2 years, will threaten bankruptcy to many of the companies affected. Liability for even a small portion of these claims will threaten the survival of many of these companies.

5. On the basis of the evidence, it seems reasonably clear that prior to 1943, the parties had no notice of their potential liability under the overtime provisions of the Fair Labor Standards Act. Indeed, as early as December 1938, in a letter written by the regional attorney of the Wage and Hour Division in San Francisco, to a representative of the longshore industry, the statement was made that the clock overtime arrangement constituted statutory overtime. This letter was part of the evidence produced in the recent trial of the issue before the Federal district court in California, as part of the good-faith defense under the Portal-to-Portal Act (Public Law 49, 80th Cong.). The court rendered judgment against the plaintiffs on the basis of this defense. (See *Moss v. Hawaiian Dredging Co.,* decided March 30, 1949, Case No. 25299-G, United States District Court, Northern District of California, Southern Division.)

6. Great reliance is placed by opponents of retroactivity upon the position taken by the Wage and Hour Division in 1943 and subsequent thereto. In a letter to the War Shipping Administration, dated October 15, 1943, the Administrator stated that in his view the overtime practice of the longshore industry was in violation of the overtime provisions of the Fair Labor Standards Act. He noted that any change in wage practices of firms operating under contract with the War Shipping Administration required approval of that agency and therefore invited comments and suggestions from it. There followed numerous conferences among interested Government agencies and it was the view of the War Shipping Administration, the Army and Navy, and the Department of Justice, that the Wage and Hour Administrator was wrong in his construction of the act. While the Administrator is vested with responsibility of administering the Fair Labor Standards Act, and consequently his views are to be accorded considerable weight, his judgment is not necessarily infallible. Thus, the Administrator, during this period, continued to uphold the propriety of crediting week end and holiday contract overtime against statutory overtime although it is to be noted that the Supreme Court subsequently ruled that this practice was likewise erroneous. These circumstances, i. e., the division of view among responsible Government officials, the length of the period during which the parties had observed this practice without issue being raised, and the fact that there was a reasonable question as to the correctness of the Administrator's view, deprive the notice argument of much of its persuasive force.

The committee therefore, recommends that the bill include a provision for retroactivity. Precedent for such a

retroactive provision is found in the Portal-to-Portal Act. Under section 2 of that act, Congress provided relief against portal-to-portal claims arising out of the Supreme Court decision in the *Mt. Clemens case* (328 U.S. 680). Under section 3 (d) of that act, Congress retroactively validated compromise agreements which had been rendered invalid by the Supreme Court decision in *Schulte v. Gangi* (328 U.S. 108). In section 9, Congress provided for good-faith defense against existing Wage and Hour claims of all kinds in order to meet the problems resulting from Supreme Court decisions in cases such as *Jewell Ridge Coal Corp. v. Local No. 6167, UMW* (325 U.S. 161), and *Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607).

The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "Such matters," the courts have declared, "are for Congress and not for the courts" (*Missel v. Overnight Motor Transportation Co.,* 126 F.(2d) 98, 111, affirmed 316 U.S. 572). (See also *Birbalas v. Cuneo Printing Industries,* 140 F.(2d) 826, 829.)

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We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that act—the "workweek" in the portal-to-portal situation and

"regular rate" in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penalize employers who attempted in good faith to comply with the wages-and-hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress.

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Appendix C

EXCERPTS FROM TEXT OF PORTAL-TO-PORTAL PAY ACT OF 1947

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

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SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC. —In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

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